

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION**

**GARRY F. MCCARTHY,
SUPERINTENDENT OF POLICE OF
THE CITY OF CHICAGO,**

Plaintiff,

v.

**ALFREDO VIVAS, JR. and THE
POLICE BOARD OF THE CITY OF
CHICAGO,**

Defendants.

15 CH 00791

Hon. Kathleen Pantle

ORDER

This case comes before the Court on Plaintiff Chicago Police Superintendent Garry McCarthy's ("the Superintendent") Complaint for Administrative Review of a final decision by the Police Board of Chicago ("the Board") which found Defendant Alfredo Vivas Jr. ("Defendant" or "Vivas") not guilty of three charges filed against him by the Department. The decision of the Board is affirmed.

Factual Background

Defendant Alfredo Vivas Jr. is a highly-decorated detective with the Chicago Police Department. Vivas suffers from gout, a painful foot condition. Despite his medical condition he has missed only one day of work in his 17-year career with the Chicago Police Department. Vivas is married to Guadalupe Torres ("Torres"), who is a nurse at Loyola University Medical Center. Torres is the lead nurse on a transplant team at Loyola.

On September 4, 2013, Vivas was suffering an acute flame-up of his gout. He called his wife and asked her to schedule an appointment with his primary care physician. Torres was unable to make an appointment for him. Instead, Torres spoke to Dr. Susan Hou, a physician at Loyola. Dr. Hou was the head of the transplant team for which Torres worked. Dr. Hou was, at all relevant times, licensed to practice medicine in Illinois and authorized to prescribe narcotics.

Hou told Torres that Vivas needed to take an opiate-based pain killer. Hou verbally authorized Torres to give Vivas Tylenol 3 with codeine that Torres had at home, which she did.

On September 6, 2013, Vivas took a random drug test. The results showed a low level of codeine in his system. It is undisputed that the level of codeine the test revealed is consistent with the two tablets Vivas took two days before, but inconsistent with long-term abuse of the drug. Vivas was charged with three violations of department rules: Rule 1, violation of any law or ordinance; Rule 2, any action or conduct which impedes the Department's efforts to achieve its policy and goals; and Rule 6, disobedience of an order or directive, whether written or oral. The Department filed charges seeking Vivas' discharge because the Superintendent believed Vivas did not have a valid prescription for the codeine.

Administrative Hearing

The Police Board convened a hearing against Vivas on these charges on September 17-18, and October 27, 2014. Vivas testified that when his wife handed him the Tylenol 3 tablets, she stated that they had been prescribed by Dr. Hou. A number of character witnesses testified on Vivas' behalf, painting a picture of him as a meticulous and competent investigator. Dr. Hou testified that even though she had not examined Vivas, she knew that he had suffered from gout for ten years. Hou testified that by authorizing Torres to give her husband the Tylenol, that constituted a verbal prescription. Another defense witness, Dr. James O'Donnell, an expert in pharmacology and professor at Rush Medical College, testified that since Vivas took a controlled substance prescribed by a licensed physician, the controlled substance was not a prohibited substance. In other words, the oral prescription given by Dr. Hou was valid. Dr. O'Donnell also specifically testified that there was a doctor-patient relationship between Dr. Hou and Vivas. He further testified that while this was not the normal face-to-face prescription procedure, verbal prescriptions were common and valid.

The Superintendent's expert witness, Dr. Conibear, testified that, while it was improper for Dr. Hou to repurpose drugs that had been prescribed to Torres, doctors are allowed to give verbal prescriptions. Dr. Conibear also testified that she did not believe there was a doctor-patient relationship established between Dr. Hou and Vivas.

Based on the testimony, the Police Board found Vivas not guilty of the three alleged violations. The Board found that since Vivas had a valid prescription for the Tylenol 3, he did

not have the requisite intent to violate the statute regarding possession of a controlled substance. 720 ILCS 570/402. In addition, the Board found that since Vivas only took codeine with a valid prescription, he was not guilty of impeding the Department's policy or goals, or of disobeying any orders or directives. Therefore, the Board unanimously found that there were no grounds for discharge.

Standard of Review

A trial court's review of an agency's decision regarding discharge is a two-step process. *Carrigan v. Board of Fire & Police Comm'rs*, 121 Ill. App. 3d 303, 308 (2nd Dist. 1984). First the court must determine if the agency's findings of fact are contrary to the manifest weight of the evidence. *Id.* Second, the court must determine if the findings of fact provide a sufficient basis for the agency's conclusion that cause for discharge does or does not exist. *Id.*

The findings of the Police Board are held to be *prima facie* true and correct. *Collura v. Board of Police Comm'rs*, 113 Ill. 2d 361, 372 (1986). A court, on administrative review, should not reweigh the evidence to determine where the preponderance lies but limit its inquiry to ascertaining whether the findings and decision of the agency are contrary to the manifest weight of the evidence. *Id.* An agency decision is contrary to the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Abrahamson v. Ill. Dept. of Prof'l Regulation*, 153 Ill. 2d 76, 88 (1992). If the evidence in the record supports the Board's determination, it should be upheld by the trial court. *Rispoli v. Police Board of Chicago*, 188 Ill. App. 3d 622, 635 (1st Dist. 1989).

The Board's Findings are Not Contrary to the Manifest Weight of the Evidence

The Court must first determine whether the Board's findings are contrary to the manifest weight of the evidence. The Superintendent argues that they are because the Board erroneously found that Vivas took the codeine under a valid prescription. Specifically, the Superintendent argues that the defense witnesses incorrectly testified that only a licensed physician's authorization is necessary for a valid verbal prescription. Instead, the Superintendent cites its own expert witness, Dr. Conibear, who testified that the verbal prescription was not valid because Dr. Hou did not have a doctor-patient relationship with Vivas. The Superintendent also claims that the Board did not determine the relative credibility of the witnesses because at one point the Board cited Dr. Conibear's testimony where she agreed with the defense witnesses.

It is for the trier of fact to evaluate all evidence, judge the credibility of witnesses, resolve any conflicts in the evidence, and draw reasonable inferences and conclusions from the facts. *Anderson v. Ill. Dep't. of Prof'l Regulation*, 348 Ill. App. 3d 554, 561 (1st Dist. 2004). In this case, the Board heard the testimony of Vivas, Torres, Dr. Hou, four character witnesses, and the medical experts. Dr. Conibear testified that the prescription was invalid because there was no doctor-patient relationship, and because taking medicine prescribed to another person was a *per se* violation. However, the Board compared Dr. Conibear's testimony to the testimony of Dr. Hou and Dr. O'Donnell, who testified that the verbal prescription was valid. After doing so, the Board decided unanimously that Vivas had a valid prescription for the Tylenol 3, or, at the very least, had a sufficient good faith belief to prevent him from violating the criminal statute.¹

Although Illinois law clearly states that the reviewing court is not to reweigh the evidence or judge the credibility of witnesses, the Superintendent is asking this Court to do just that. The Superintendent argues that the Board failed to give proper weight to several facts laid out in Dr. Conibear's testimony. The Superintendent seeks to avoid the prohibition on reviewing court's determining witness credibility by claiming that the Board did not make such a determination, even though it chose to give more weight to Dr. Hou and Dr. O'Donnell's testimony than Dr. Conibear's. The Board's findings were clear, however, as the Board determined, "The preponderance of the evidence in this case established that there was a valid oral prescription issued by a physician licensed to prescribe Tylenol 3." Inherent in the Board's finding is that the Board accepted as true the testimony of Dr. Hou and Dr. O'Donnell that a valid oral prescription was given to Vivas, a patient of Dr. Hou's, and rejected Dr. Conibear's testimony that the prescription was invalid due to the lack of a doctor-patient relationship. The Board also rejected Dr. Conibear's assertion that what occurred here was a "repurposing" of a prescription (which is not authorized) as the Board specifically found that the prescription was valid. Had the Board agreed with Dr. Conibear, it would not have found that the prescription was valid.

The Superintendent argues that the Board erred in its footnote wherein it pointed out that Dr. Conibear testified that the prescription was not valid because Dr. Hou did not have a "traditional doctor-patient relationship" with Vivas. Instead, Dr. Conibear testified there was "no doctor-patient relationship" rather than "no traditional doctor-patient relationship". This

¹ 720 ILCS 570/402 makes it unlawful to knowingly possess a controlled substance.

argument fails, however, because the Superintendent is merely pointing out a distinction without a difference. The Board considered the testimony of the witnesses and determined that Dr. O'Donnell was credible when he testified that there was, in fact, a doctor-patient relationship between Dr. Hou and Vivas, and that Dr. Hou was credible when she testified that the prescription she gave to Vivas was valid.

The Superintendent's argument that the Board did not judge the relative credibility of the witnesses because it credited Dr. Conibear's opinion on some matters is not borne out by the Board's decision. In its decision the Board makes specific findings of fact as to the credibility of some of the witnesses. Moreover, as stated above, given the Board's ultimate decision, it is inherent in that decision that the Board decided this case based, in part, on the credibility of the witnesses.

The Board's finding of fact is held to be *prima facie* true and correct. The Board's finding that Vivas had a valid prescription is not contrary to the manifest weight of the evidence because the finding is supported by evidence in the record and the opposite conclusion is not clearly evident. Therefore, the Board's finding of fact is entitled to deference from the trial court.

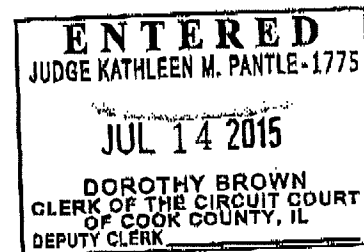
The Board's Finding of Fact Supports their Final Decision

Second, the Court must determine whether the Board's findings of fact provide a sufficient basis for their finding that grounds for discharge do not exist. In this case, the finding that Vivas had a valid verbal prescription for the Tylenol 3 was the basis for the Board's ruling that the Department failed to meet its burden of proof. Accepting the finding of fact, as the Court does, leaves no logical alternative to the Board's final decision. Taking medicine with a valid prescription does not violate state law, undermine the Department's goals, or disobey orders. Because the Board's finding is not contrary to the manifest weight of the evidence and the facts are sufficient to support their finding that grounds for discharge do not exist, there was no error by the Board.

The decision of the Police Board is affirmed.

This is a final Order disposing of all litigation in this matter.

DATE: July 14, 2015



Kathleen M. Pantle